UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE: JOHN DOE,
Petitioner,

No. 19-1096

SEC'S VERIFIED OPPOSITION TO JOHN DOE'S MANDAMUS PETITION

In Section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), 15 U.S.C. 78u-6, Congress authorized the Securities and Exchange Commission ("SEC" or "Commission") to develop a whistleblower program to incentivize individuals to report possible violations of the federal securities laws to the Commission. In May 2011, the Commission adopted rules implementing the Commission's authority to pay whistleblower awards of between 10% and 30% of monetary sanctions recovered to individuals who voluntarily provide the Commission with original information that leads to a successful SEC enforcement action resulting in sanctions exceeding $1 million. A whistleblower may similarly be entitled to an award based on monetary sanctions imposed in a "related action" brought by certain other governmental authorities, such as the Department of Justice ("DOJ"). Whenever an enforcement action results in monetary sanctions exceeding $1 million, the Commission posts a Notice of Covered Action ("NoCA") informing the public of the covered action so that

individuals who have provided information to the Commission can submit an award application as prescribed by Commission regulations. These regulations also established the manner and criteria by which the Commission evaluates whistleblower award applications.

In September 2016, GlaxoSmithKline ("Glaxo") agreed to pay $20 million to resolve an SEC action against it. Under SEC whistleblower rules, whistleblowers could be entitled to between $2 million and $6 million relating to the Glaxo matter. The SEC issued NoCA 2016-159 regarding the Glaxo matter on November 30, 2016. Doe, contending that he provided information leading to the SEC enforcement action, filed an award application on February 27, 2017. The Office of the Whistleblower ("OWB") is reviewing Doe's application, but a preliminary determination has not yet been issued.

In his Petition, Doe argues that the Commission has unduly delayed adjudicating his whistleblower award application and asks for an order directing the Commission to issue a preliminary determination regarding his claim within 60 days and a final order within six months. Doe's Petition is predicated primarily upon his assertion that adjudicating his claim is a "simple task" that requires little more than "a conversation" between SEC claim reviewers and investigative staff and review of a "confined record entirely within the agency's knowledge." Pet. at 2, 20 & 31. Doe claims there is "no reason to believe that [his] claim for a

whistleblower award is substantially more complex" than "simple cases with one whistleblower" that the SEC resolved more quickly. *Id.* at 18-19.

Doe greatly misapprehends the work and effort (and therefore time) involved in reviewing whistleblower claims, including his. Doe overlooks the substantial complexities involved in adjudicating claims regarding the Glaxo matter because, among other things, there are ten claimants in this matter (not only Doe as he apparently presumes). And Doe ignores that the SEC is processing a voluminous number of whistleblower applications that require the attention of the Commission in addition to his claim.

This Court should deny Doe's Petition as he has not established – and cannot – that he is entitled to relief under the six-factor test established in *Telecommunications Research and Action Ctr. v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) ("*TRAC*"), to analyze whether an agency has so unreasonably delayed in taking an action to warrant the extraordinary remedy of mandamus. As Doe concedes, Pet. at 27, Congress did not establish a deadline by which whistleblower applications must be resolved and the SEC is working diligently and reasonably to adjudicate its pending award claims, while also addressing its other law enforcement and regulatory responsibilities. Granting Doe's Petition would force the Commission to adjudicate Doe's claims before those of other comparably-

situated claimants and upset the Commission's judgment regarding the most effective way to prioritize its whistleblower claims review and other tasks.

BACKGROUND[1]

A. The Claims Review Process.

Section 922 of Dodd-Frank requires the Commission to pay awards, subject to certain limitations and conditions, to whistleblowers who voluntarily provide the Commission with original information about a violation of the federal securities laws that leads to a successful enforcement action resulting in more than $1,000,000 in monetary sanctions. *See* 15 U.S.C. 78u-6. The Commission promulgated regulations establishing the process by which award claims are submitted to, and evaluated by, the Commission. This process ensures that claimants have ample opportunity to provide evidence in support of their claims and that Commission staff thoroughly and consistently evaluate these applications.

The whistleblower program has led to the Commission receiving thousands of tips per year regarding potential securities law violations. *See 2018 Whistleblower Annual Report to Congress*, available at https://www.sec.gov/files/sec-2018-annual-report-whistleblower-program.pdf, at 20. The Commission has issued whistleblower awards totaling approximately

[1] The facts submitted in this filing are verified by the Verification submitted by Jane Norberg, Chief of the Office of the Whistleblower, attached to this memorandum.

$384 million to 64 claimants (including a combined $83 million shared by three individuals on one covered action) who provided original information that led to enforcement actions requiring wrongdoers to pay more than $1.7 billion in total monetary sanctions. To date in 2019, the SEC has awarded nearly $60 million to five different individuals. *See* https://www.sec.gov/whistleblower/pressreleases. Since the inception of the program, the Commission has also issued Final Orders denying over 450 claims for awards, including denying 42 claims in FY2019. The Commission has devoted significant resources to adjudicating whistleblower claims.

The whistleblower program is managed by OWB, which is a component of the Commission's Division of Enforcement ("Enforcement"). Enforcement is responsible for investigating and prosecuting violations of the federal securities laws. See 17 C.F.R. 200.19b, and 17 C.F.R. 200.30-4. Whenever an enforcement action leads to monetary sanctions of more than $1,000,000, the Commission issues a NoCA. 17 C.F.R. § 240-21F-10(a). Individuals who contend that they are whistleblowers entitled to an award have 90 days from the posting of the NoCA to submit an award application. 17 C.F.R. § 240-21F-10(b). Claimants frequently supplement their applications with additional materials while their claims are pending before the agency.

1. Review and Analysis of Award Applications.

Claims on each NoCA are assigned to an attorney-reviewer in OWB who works with investigative staff on the compilation of a record upon which to assess those claims – a labor-intensive, time-consuming process. The reviewer searches a variety of Commission databases to evaluate the information that each claimant provided to the Commission. Often there are significant communications between the reviewer and investigative staff regarding a claimant's contribution to the action. Detailed, lengthy declarations are prepared and signed in connection with each claim that outline a claimant's contributions to the case as well as other factors that go into the award analysis. In addition, OWB may reach out to claimant (and/or claimant's counsel) if further information is needed to supplement the record and enable OWB to gain an understanding of, and documentation for, the claim. In cases where there are claims for awards based on the cases brought by other federal agencies, the reviewer coordinates with those other authorities to assess the degree to which claimant aided in their recoveries. Doe's assertion that the Commission relies on a confined record within the agency's control is wrong. *See* Pet. at 20.

Many NoCAs have more than one claimant and their relative contributions to the SEC enforcement action and the related action(s) must be evaluated in assessing each individual's claim. In formulating its recommendation, OWB must

also assess whether any factors (whether set forth by Congress or by SEC regulations) that might reduce or negate a claimant's award – such as a claimant's culpability in the underlying misconduct or delay in reporting – exist for each claimant.

In addition to recommending whether an award application should be granted or denied, in cases where an award is recommended, OWB also recommends the award percentage between 10% and 30%. The factors evaluated by OWB in determining the recommended percentage include, for example:

> (1) the significance of the information provided by the whistleblower and the degree to which the information supported successful claims by the Commission; (2) the degree to which the whistleblower's information and assistance saved Commission resources; (3) the timeliness of the whistleblower's initial report to the Commission; (4) whether the whistleblower provided ongoing extensive, and timely cooperation to the investigation; (5) whether the whistleblower encouraged or authorized others to assist the investigation; (6) efforts undertaken by the whistleblower to remediate harms caused by the violation; (7) any unique hardships faced by the whistleblower because of his or her reporting; (8) the law enforcement interest in the case, such as the degree to which an award enhances the Commission's ability to deter future violations, whether it will encourage the submission of high quality information by future whistleblowers, whether the subject matter of the action is a Commission priority, and the dangers to investors and others from the underlying violations; (9) whether the whistleblower reported violations internally or assisted in an internal investigation; (10) whether the whistleblower was culpable in the underlying action, including whether he or she acted with scienter or profited from the violations; and (11) whether the whistleblower is a recidivist. *See* 17 C.F.R. § 240.21F-6.

OWB staff work with the investigative staff at the SEC (and at times other authorities) responsible for the underlying enforcement action(s) to prepare detailed affidavits that describe the contributions made by each claimant and other factors relevant to an award determination.[2]

2. Preparation of an Award Recommendation.

OWB staff prepares a written recommendation as to whether the claimant is eligible for an award for the particular covered action (and any applicable related actions), and, if so, recommends an award percentage. This requires a detailed and often complex analysis of the facts of the case and each claimant's contributions, if any, as well as the applicable legal standards governing awards. Each recommendation goes through a rigorous review process. First, OWB produces a recommendation regarding an application (which goes through an internal review in OWB by the applicable Assistant Director and the Chief of the Office). Next, the Office of Chief Counsel ("OCC") in Enforcement generally reviews the recommendation, and thereafter it is reviewed by the Office of General Counsel ("OGC"). Each step may require supplementation of the record and/or further explanation for the award decision(s). *See* 17 C.F.R. § 240-21F-10(d).

[2] Even where other agencies are not consulted, reviewers do not work with a static record. Detailed affidavits outlining claimants' assistance must be produced and reviewers draft detailed memoranda justifying their award recommendations.

OWB submits its recommendation to the Claims Review Staff (consisting of senior officers designated by the Co-Directors of Enforcement), which issues a Preliminary Determination ("PD") of (a) whether the Commission should grant or deny the claim, and (b) with respect to the former, the recommended percentage amount of an award. *Id*. OWB then sends the Claims Review Staff's PD to the claimant(s) under the NoCA, which requires OWB staff to redact certain information in PDs concerning more than one claimant. Claimants then have 30 days to request the record that formed the basis for the PD and/or request a meeting with OWB staff. 17 C.F.R. § 240-21F-10(e)(1)(i) and (ii). In preparing the record, OWB staff redacts any information that could identify another claimant.[3] 17 C.F.R. § 240-21F-12(b).[4] Once claimants receive the record, they have 60 days to seek reconsideration of the PD; in their reconsideration request, claimants may submit additional information, documentation or factual or legal analysis to

[3] Congress mandated that, with limited exceptions, the Commission not disclose any information, including information provided by a whistleblower, "which could reasonably be expected to reveal the identity of a whistleblower." 15 U.S.C. § 78u-6(h)(2)(A). Information that is redacted typically includes another claimant's name, profession, employer, details about the tip, or any other information that might reveal the identity of any other whistleblower.

[4] Doe's claim that the SEC "obfuscate[s] its delays by redacting information" is wrong. *See* Pet. at 17. The SEC has not changed its redaction protocol and redacts information to minimize the risk of possible identification of the whistleblower, who is often an insider at the company identified in the NoCA. The SEC will at times disclose which NoCA the award relates to when the whistleblower has no ties to the company in question and could not be linked to the company.

buttress their claims. 17 C.F.R. § 240-21F-10(e)(2). A claimant's submission of new information may prompt further consultation with investigative staff and the preparation of additional declarations. OWB staff also prepares a second written recommendation for the Claims Review Staff to address a claimant's reconsideration request. This additional recommendation goes through the same rigorous review process that the preliminary memorandum underwent (*i.e.,* review by an Assistant Director and the Chief of OWB, review by OCC, and finally, review by OGC). The reconsideration stage can be just as time consuming and labor intensive as the preliminary review stage — if not more so.

Once the record has been compiled and the recommendation for a claimant's reconsideration request has been written and approved by the necessary offices, the Claims Review Staff sends the Commission a Proposed Final Determination ("PFD"). The Commission has 30 days to consider each PFD. On the 30th day, the PFD becomes the Final Order of the Commission unless a Commissioner requests that the recommendation be reviewed further by the Commission. 17 C.F.R. § 240-21F-10(h). When a Commissioner requests review of a PFD, the Commission reviews the recommendation and determines whether to approve the PFD. *Id.* OWB provides a Final Order to the claimant(s), which any claimant who was denied an award can appeal to a United States Court of Appeals. 15 U.S.C. § 78u-6(f); 17 C.F.R. § 240.21F-13. Because a successful appeal as to any claimant

could affect any award to other claimants, all claims filed in response to a particular NoCA must be addressed in a single Final Order and all appeals from that Final Order must be fully resolved before any successful claimant under that NoCA may be paid. *See* 17 C.F.R. § 240.21F-14(c)(2). Therefore, a delay in the adjudication of any claimant's application prevents a Final Order from being issued for all claimants under that NoCA.[5]

B. Other OWB and Enforcement Responsibilities.

The Commission must balance its desire to process award claims within a reasonable period with the need to devote resources to other important Commission responsibilities. Enforcement (of which OWB is a component) plays an essential role in enforcing the nation's securities laws. From fiscal year 2016-2018, the Commission brought approximately 1,484 stand-alone enforcement actions, 601 follow-on proceedings, and 358 delinquent filing proceedings. *See* 2018 Annual Report Division of Enforcement, at 9, *available at* https://www.sec.gov/files/enforcement-annual-report-2018.pdf. During that period, the Commission obtained judgments and orders for approximately $3.945 billion in penalties and disgorgement. *Id.* at 11. These enforcement actions

[5] In multi-claimant cases, OWB sometimes issues a PD for an obviously non-meritorious claimant quickly and separately. If the Claimant fails to request reconsideration, the PD becomes the Final Order of the Commission. 17 C.F.R. § 240.21F-10(f). This prevents a non-meritorious claimant's later appeal from causing a delay in the issuance of an award to a meritorious claimant.

involved insider trading, offering frauds, Ponzi schemes, cyber-frauds, accounting frauds, initial coin offering frauds, market manipulation, Foreign Corrupt Practices Act ("FCPA") violations, gatekeeper (accountants/lawyers) misconduct, public finance abuse, and other misconduct. These actions are essential for protecting the integrity of the securities markets and retail investors. Allocating additional Enforcement staff to OWB would necessarily limit the investigative and trial staff available to bring these critical cases.[6]

It also bears emphasis that claims review is not the only responsibility of OWB staff. OWB works to advance Dodd-Frank's anti-retaliation provisions and assists investigative staff in identifying and prosecuting cases in which a whistleblower suffers retaliation for providing information to the Commission. OWB also seeks to identify and challenge confidentiality agreements and other practices that companies use to discourage employees from reporting information to the Commission in violation of 17 C.F.R. § 240.21F-17. OWB works with investigative staff and staff from other government agencies (foreign and domestic) on issues related to maintaining whistleblower confidentiality through investigations and any related litigation. OWB does extensive public outreach to inform the public about the whistleblower award program and protections afforded

[6] However, three Enforcement attorneys and one attorney from another office are currently detailed to OWB, demonstrating the Commission's good faith effort to expedite claims review.

whistleblowers, and it staffs a whistleblower hotline where members of the public can ask questions about the whistleblower program. Despite receiving thousands of calls a year, OWB returns calls within three business days. To maintain this response time, at least one OWB attorney needs to staff the hotline each day.

OWB staff has also worked on proposed amendments to the SEC's whistleblower regulations. *See Whistleblower Program Rules*, 83 Fed. Reg. 34702 (July 20, 2018). Among other changes, the proposed regulations would create a summary disposition process that would allow for a more streamlined review of applications that can be denied on a relatively straightforward basis. As such applications would be handled by OWB without involvement of the Claims Review Staff, there would be a shorter time for reconsideration, and presumably a smaller administrative record. 83 Fed. Reg. at 34726-27, proposed 21F-18. Each of these changes is designed to allow award claims to be adjudicated more quickly and to enable OWB to spend more resources on claims more likely to result in an award. The comment period closed September 18, 2018, and the Commission is reviewing comments and finalizing recommendations regarding the rulemaking.

OWB attorneys also spend a significant amount of time on other responsibilities that do not involve claims processing, such as:

- Counseling Enforcement attorneys about whistleblower-related issues that arise during investigations, such as the confidentiality provisions of Dodd-Frank and the extent to which whistleblower-identifying

information may be shared with other law enforcement or regulatory entities under that statute;

- Responding to FOIA requests;
- Drafting OWB's Annual Report to Congress;
- Reviewing Actions Memos drafted for the Commission by Enforcement investigative teams regarding recommendations in matters that involve whistleblowers; and
- Overseeing the intake and processing of hard-copy Form TCRs.

B. Glaxo Settlement

In September 2016, Glaxo agreed to pay $20 million to settle charges that it violated the FCPA because its China-based subsidiary engaged in a pay-to-play scheme to increase its sales in China. The SEC issued NOCA 2016-159 as a result of the settlement.

C. Whistleblower Claims Concerning NoCA 2016-159.

Doe suggests that he is the only claimant for NOCA 2016-159 and that the Commission need only assess the information he provided regarding the Glaxo investigation to reach a determination on his application. Pet. at 19. Doe is incorrect. There are ten claimants whose claims must be assessed to determine their absolute and relative entitlements, if any, to an award.

1. Doe's claims.

Doe submitted nearly 1,000 pages in support of his application, and asserts that the "record confirms that the SEC acted on Petitioner's tip and used the

information provided" to bring its case against Glaxo. Pet. at 16. But Doe is not privy to SEC internal initiatives that may have been ongoing, other tips that the Commission may have received, or the degree to which those tips may have led to the Commission's investigation of Glaxo. *See e.g.,* https://www.sec.gov/news/speech/2015-spch030315ajc.html (discussing pharmaceutical industry-wide focus on FCPA cases). Finally, the fact that a whistleblower provides useful assistance at some point during the course of an investigation does not necessarily mean that he provided "original information" that "led to the successful enforcement" action, and therefore may be eligible for an award. 15 U.S.C. § 78u-6(b)(1).

2. Other Claimants

There are nine other claimants who believe that they are entitled to whistleblower awards because of the information and/or documents they provided to the SEC, DOJ, and/or other authorities. While the merits of any claimant's application are beyond the scope of the Petition, the bases for their claims are very briefly described to provide a sense of the competing claims that OWB reviewers must evaluate.

a. Claimant 2

Claimant 2 contends that documents and information that he or she provided led to a new area of SEC investigation of Glaxo in China and/or significantly

contributed to the $20 million settlement. Claimant 2, through counsel, submitted extensive documentation to the Commission. Claimant 2, like Doe, contends he or she faced retaliation for the assistance provided.

b. Claimants 3, 4, and 5

Claimants 3, 4, and 5 submitted a joint application. They claim that they provided extensive documentation outlining the precise misconduct in China that was covered by the SEC settlement. Their counsel filed a detailed whistleblower application with extensive documentation in support of their claim.

c. Claimants 6-10

In four separate applications,[7] Claimants 6-10 claim that they provided information that led the SEC to expand an existing FCPA investigation in particular countries outside of China. They contend that the inquiries in these countries, at least in part, led to the sanction paid by Glaxo because the Order against Glaxo refers to "instances of similar improper conduct in connection with sales in other countries in which [Glaxo] operates." *In re GlaxoSmithKline*, A.P. File No. 3-17-606 (Sept. 30, 2016), at https://www.sec.gov/litigation/admin/2016/34-79005.pdf. Their counsel, like

[7] Claimants 6 and 7 filed a joint application.

Doe's counsel,[8] filed detailed whistleblower applications with extensive documentation purportedly supporting their respective claims.

D. Doe's "Comparator" Cases

Doe argues that the SEC has acted more quickly on certain whistleblower applications and that it therefore must do the same on his. Pet. at 18-20. However, three of the cases he cites involved a single claimant, making them far easier to resolve. Pet. at 19. Two of those cases were from 2013 and 2014, when the Commission had received far fewer award claims. *Id.* And there were compelling circumstances concerning a claimant's personal situation, not present in the matter here, that led the Commission to expedite handling of one multi-claimant matter. (Confidentiality requirements prevent disclosing details).

[8] The same counsel submitted the whistleblower applications for Doe and Claimants 6 - 10. Doe has separate appellate counsel and it is unclear if appellate counsel was aware that there were multiple claimants under NOCA 2016-159, contrary to what the Petition suggests.

ARGUMENT

Doe asks this Court to direct the Commission to issue a preliminary determination within 60 days and a Final Order within six months. As we demonstrate, Doe has not shown that he is entitled to such extraordinary relief.

I. Mandamus is Rarely Granted When it Would Upset An Agency's Reasoned Determination Regarding Its Priorities.

Doe's petition for a writ of mandamus seeks relief under the Administrative Procedure Act ("APA"), which authorizes federal courts to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). But "[m]andumus is an extraordinary remedy, warranted only when agency delay is egregious." *In re Monroe Commc'ns Corp.*, 840 F.2d 942, 945 (D.C. Cir. 1988); *see also Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 369 (2004) ("Mandamus is a drastic and extraordinary remedy reserved for really extraordinary causes.") (internal citations and quotation marks omitted). This is because, as a leading treatise has explained,

> [w]hen a court is called upon to order an agency to take action in a given matter by a certain date, the court is being asked, in effect, to reorder the agency's priorities and to reallocate its resources. An agency cannot expedite its decisionmaking in one matter without diverting resources from other matters, thereby slowing the process of decisionmaking in those matters. Thus, in deciding whether to grant relief under APA § 706(1), a court must focus not on the detail of the agency's method of proceeding with respect to the particular matter, but rather on a broad assessment of the temporal urgency of that matter in comparison with the temporal urgency of the scores,

> hundreds, or even thousands of other matters for which the agency has decisionmaking responsibility.

Richard J. Pierce Jr., Administrative Law Treatise § 12.3, at 1068 (5th ed. 2010); *see also Sierra Club v. Thomas*, 828 F.2d 783, 797 (D.C. Cir. 1987) ("Because a court is in general ill-suited to review the order in which an agency conducts its business, we are properly hesitant to upset an agency's priorities by ordering it to expedite one specific action, and thus to give it precedence over others.") (internal citations and quotation marks omitted), *superseded by statute*, 42 U.S.C. § 7604(a), *as recognized by the Court in Mexichem Specialty Resins, Inc. v. E.P.A.*, 787 F.3d 544 (D.C. Cir. 2015).[9]

In determining whether to take the extraordinarily rare step of compelling agency action under Section 706(1), this Circuit applies the six-part balancing test set forth in *TRAC*, 750 F.2d at 80:

> (1) the time that agencies take to make decisions must be governed by a "rule of reason;"
>
> (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason;

[9] *Mexichem* specifically noted that the statutory change superseding part of the *Sierra Club* decision did not impact the "analytical framework for determining whether the EPA's" delay was unreasonable, meaning *Sierra Club* remains good law on the issue presented here. *See Mexichem*, 787 F.2d at 554 n.6.

(3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake;

(4) the effect of expediting delayed action on agency activities of a higher or competing priority;

(5) the nature and extent of the interests prejudiced by delay; and

(6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

(internal citations and quotation marks omitted). This standard is highly deferential to government agencies. Pierce, *supra*, § 12.3, at 1069 ("It is hard for a petitioner to prevail under this deferential standard, and most do not."). *See, e.g.*, *Grand Canyon Air Tour Coal v. FAA*, 154 F.3d 455, 477-78 (D.C. Cir. 1998) (denying writ notwithstanding a 10-year delay in issuing a rule and 20-year delay to achieve the rule's statutory objective); *Oil, Chemical and Atomic Workers Int'l Union v. Zeeger*, 768 F.2d 1480, 1487-88 (D.C. Cir. 1985) (denying writ after a 5-year delay); *Monroe*, 840 F.2d at 945-47 (refusing to issue writ despite a 3-year delay from the ALJ's initial decision and 5-year delay since the start of the proceedings). These delays are all far longer than the slightly more than two-year period faced by Doe.

II. Doe Has Failed to Meet his Burden to Demonstrate that This Case Is One of the Extraordinarily Rare Matters Where an Order Compelling Agency Action Is Appropriate.

The *TRAC* factors each weigh against granting the relief Doe seeks.

1. *Rule of Reason*

The first *TRAC* factor seeks to assess the overall reasonableness of the time the matter has been pending before the agency. *TRAC*, 750 F.2d at 80. "That issue cannot be decided in the abstract, by reference to some number of months or years beyond which agency inaction is presumed to be unlawful, but will depend in large part . . . upon the complexity of the task at hand, the significance (and permanence) of the outcome, and the resources available to the agency." *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1102 (D.C. Cir. 2003) (vacating and remanding a trial court ruling that a 5-year delay was unreasonable due to the court's failure to consider the agency's resource constraints).

Doe's contention that the SEC's delay is unreasonable is predicated upon his mistaken belief that the SEC's evaluation of Doe's whistleblower application is a "simple task for which 'a reasonable time for agency action is typically counted in weeks or months, not years.'" Pet. at 25 (quoting *In re American Rivers and Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004)). That is not factually or legally accurate.

First, the claims review process is far more complex than Doe contends. An initial reviewer must often review hundreds of pages of documents submitted by the claimants. Doe's application and appendices was nearly 1,000 pages and other claimants in this case collectively submitted more than 1,000 pages. Petitioner in

No. 19-1095 (a companion mandamus case) submitted nearly 700 pages. Staff also reviews various internal databases to assess the claimants' contributions. The reviewer must work extensively with investigative staff at the SEC (and DOJ, or other criminal or regulatory authorities if they brought parallel proceedings) to assess the various factors that impact whether a claimant is entitled to an award, and if so how much, often (as here) weighing that claimant's application against the claims of other claimants. Here two claimants assert that information they provided led to the investigation of Glaxo and/or a new areas of inquiry and ten claim to have provided extensive information to the SEC (and in some cases other authorities). The determination which claimant(s), if any, "voluntarily" provided "original information" that "led to the successful enforcement" actions involves complicated factual and legal analysis. 15 U.S.C. § 78u-6(1).

The reviewer then must prepare a detailed written recommendation for review by OWB management and other Commission offices. The Commission's reliance on this detailed, but time-consuming process, to adjudicate claims is not unreasonable given the complexity and stakes of the issues involved and the need to generate an administrative record adequate for judicial review by a United States Court of Appeals. *See In re Barr Labs*, 930 F.2d 72, 76 (D.C. Cir.) ("judges have neither the capacity nor the authority to require" "simplifications of the [agency's]

review process").[10] Notably, *Barr* involved an explicit statutory deadline that had long ago been missed by the agency, a factor not present here. *Id.*

Second, Doe fails to note that the cases he contends involved delays measured in weeks or months, in fact, involved delays lasting years. *See In re American Rivers*, 372 F.3d 413 (finding FERC's six-year delay unreasonable); *Midwest Gas Users Ass'n v. FERC*, 833 F.2d 341, 359 (D.C. Cir. 1987) (addressing a four-year delay and ordering FERC to no longer defer to a pending district court proceeding), and *MCI Telecommunications Corp. v. FCC*, 627 F.2d 322 (D.C. Cir. 1980) (concerning multi-year delay in issuing decision to change tariffs the FCC concluded were unjustified). Doe also ignores the many decisions of this Court holding that much longer delays were reasonable under the circumstances. *See supra* at 20.

Because there are so few cases ordering an agency to act – particularly when the matter has only been pending two years – Doe cites to cases where district judges were ordered to decide (non-dispositive) motions, contending the situations are analogous. Pet. at 26. They are not. A court need not, and may not, review matters outside the record in deciding a motion. In contrast, in view of the complexity of the issues presented in resolving whistleblower claims, the record

[10] As discussed, the Commission has proposed rules to simplify its processes to allow faster claims processing based on its experiences during the first seven years of the whistleblower program.

before the Commission is regularly supplemented by claimants and Commission staff so that there is an adequate record upon which to base whistleblower awards and for any judicial review of the Commission's award. And, analogizing the review of claimants' applications in the Glaxo matter to assessment of an *in forma pauperis* motion,[11] a motion to transfer venue,[12] the return of personal property after arrest,[13] a motion to vacate/amend a sentence,[14] and habeas petitions[15] is, at best, tenuous. *See* Pet. at 26.

2. *Lack of Statutory Timeline.*

In assessing the reasonableness of any delay, courts consider "whether Congress has imposed any applicable deadlines or otherwise exhorted swift deliberation concerning the matter before us." *Sierra Club*, 828 F.2d at 797. "[A]bsent a precise statutory timetable or other factors counseling expeditious action, an agency's control over the timetable of its proceedings is entitled to

[11] *In re Burrell*, 626 F. App'x 33, 35 (3d Cir. 2015).

[12] *In re Google*, 2015 WL 5294800, at *1 (Fed. Cir. July 16, 2015).

[13] *In re Blyden*, 626 F. App'x 368, 370 (3d Cir. 2015).

[14] *In re Hicks*, 118 F. App'x 778 (4th Cir. 2005).

[15] *Johnson v. Rogers*, 917 F.2d 1283, 1285 (10th Cir. 1990) and *Jones v. Shell*, 572 F.2d 1278, 1280 (8th Cir. 1978). Habeas cases also involve liberty interests not implicated in whistleblower award cases.

considerable deference." *Mexichem*, 787 F.3d at 555 (internal citations and quotation marks omitted).

Doe concedes that Dodd-Frank's whistleblower provision, 15 U.S.C. 78u-6, has neither a specific time frame by which whistleblower award determinations must be made, nor a general exhortation that application processing should be completed ahead of other agency business. Pet. at 27. Just as Congress did not "accord[] any special priority to completion of the rulemaking" at issue in *Sierra Club*, 828 F.2d at 798, Congress likewise afforded no priority to determinations regarding whistleblower awards.

Doe cites no authority for his contention that the SEC's establishment of deadlines for putative whistleblowers "suggest[s] an expectation that the OWB will act with reciprocal alacrity." Pet. at 27. The Commission's establishment of deadlines by which whistleblowers must file applications does not create reciprocal obligations on the Commission. And, while Congress set a specific deadline for whistleblowers to appeal a Commission final order, 15 U.S.C. § 78u6-(f), it did not impose any time limits on the Commission's consideration of whistleblower applications.[16] Notwithstanding the lack of a Congressionally-imposed deadline,

[16] Doe's contention that the inclusion of a deadline for whistleblowers should be read to create one for the SEC, *see* Pet at 28-29, turns basic principles of statutory construction on their head. *See, e.g., National Ass'n of Broadcasters v. FCC*, 569 F.3d 416, 421 (D.C. Cir. 2009) ("general presumption that an omission is

the Commission is working as quickly as practicable to issue award decisions without sacrificing the quality of the award determinations or neglecting its other responsibilities.

3. *Economic Regulation, Not Health and Human Welfare*

The third *TRAC* factor weighs against an order granting Doe's requested relief because any delay in issuing a decision on Doe's award claims will not result in the kind of direct threat to human health and welfare that might warrant a court order compelling agency action. *TRAC*, 750 F.2d at 80 ("delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake"). The question whether Doe is entitled to a whistleblower award is a purely financial issue that has no impact – directly or indirectly – on human health and welfare. *See Monroe*, 840 F.2d at 945 (where the interests at stake "are commercial, not directly implicating human health and welfare . . . the need to protect them through the exceptional remedy of mandamus is . . . lessened").

Doe argues that financial fraud can impact victims' health and that Glaxo's bribes may have influenced doctors' professional judgments and patient care. Pet. at 30. That may be true, but that does not mean that Doe's whistleblower award claim concerns a matter of human health and welfare. Fraud victims do not receive

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intentional where Congress has referred to something in one subsection but not in another").

a portion of whistleblower awards (unless they submitted a tip and were eligible whistleblowers), nor would a patient improperly prescribed medication receive a medical or economic benefit from an award to Doe. When (or even whether) Doe receives a whistleblower award will have no impact on the health and welfare of these victims.[17] While an award may impact Doe's financial fortunes, this case differs significantly from those where health and human welfare were directly implicated. *See, e.g., Martin v. O'Rourke*, 891 F.3d 1338, 1346 (Fed. Cir. 2018) ("Veterans' disability claims always involve human health and welfare."); *see also Action on Smoking & Health v. Dep't of Labor*, 28 F.3d 162, 165 (D.C. Cir. 1994) (denying petition even though delay concerned workplace rules on second-hand smoke).

4. *Competing Agency Priorities.*

The fourth *TRAC* factor focuses on the "effect of expediting [the] delayed action on agency activities of a higher or competing priority." 750 F.2d at 80. Courts "must give agencies great latitude in determining their agendas." *Monroe*, 840 F.2d at 946. While the Commission certainly recognizes it is important to reach a decision on Doe's application within a reasonable period, it is also

[17] *U.S. v. Mississippi Valley Generating Co.*, 363 U.S. 520, 548 (1961), cited by Doe, held that bribing a federal employee created a conflict of interest and that conflict "harm[ed] 'the public welfare.'" Pet. at 30. That is not analogous to the present case. A bribe may harm the '*public welfare*,' but that is distinct from a harm to '*human health and welfare*,' which may require prompter action by an agency.

important to reach a decision on applications filed by other putative whistleblowers and to continue the other critical enforcement work undertaken by OWB and Enforcement. Granting Doe's request would require the agency to reallocate resources to and prioritize Doe's claim over: (a) the review of award applications filed by other claimants, including some who made claims before Doe and/or that may already have been evaluated as likely to result in an award; (b) other OWB work to protect whistleblowers; and (c) other agency enforcement priorities, such as investigations of, and enforcement actions (upon which future whistleblower claims will be based) to enjoin, ongoing violations of the federal securities laws. There are at least three sound reasons that support rejecting Doe's argument on this factor.

First, the Court should not require the Commission to adjudicate one individual's claim before those of other claimants. Courts have refused to grant mandamus relief, even though all the other factors considered in *TRAC* favored it, where "a judicial order putting [the petitioner] at the head of the queue [would] simply move[] all others back one space and produce[] no net gain." *Mashpee*, 336 F.3d at 1100 (reversing a lower court decision for disregarding the importance of competing priorities) (quoting *In re Barr Labs,* 930 F.2d at 75). In *Barr* and *Mashpee*, petitioners sought a court order to require the agency to issue a ruling on a generic drug application and recognition as an Indian tribe, respectively. Both

petitions were rejected because granting relief to petitioners "would necessarily come at the expense of [other] applicants" who were similarly seeking regulatory approval/recognition. *See Mashpee*, 336 F.3d at 1100. Doe's Petition should similarly be rejected because prioritizing Doe's claim would "impose offsetting burdens on equally worthy" applicants. *Barr*, 930 F.2d at 73.

Second, ordering OWB to allocate more resources to claims review would take resources away from its other efforts to assist whistleblowers, including protecting them from retaliation and guarding their confidentiality through redaction of the administrative record. It would force OWB to cut back on resources devoted to its hotline and responding to inquiries from the public. It would pull resources from finalization of the whistleblower rules amendments, which are designed, in part, to enable the agency to process claims more quickly through a summary disposition process.

Third, ordering the SEC to devote more resources to the claims review process would take resources from other agency enforcement and regulatory efforts. In evaluating whether the SEC has unreasonably delayed ruling on Doe's award claims, it is appropriate for the Court to consider the myriad of other enforcement and regulatory activities currently on the SEC's agenda. *See, e.g., Barr*, 930 F.3d at 190 (assessing "the effect of relief on competing agency activities); *see also* https://www.sec.gov/files/enforcement-annual-report-2018.pdf

(outlining key Commission enforcement activities in fiscal year 2018 and addressing priorities for fiscal year 2019); https://www.sec.gov/files/secfy20congbudgjust_0.pdf (2018 Annual Report and FY 2020 Plan).

The SEC should be allowed to use its discretion to prioritize matters and how to allocate its resources to such matters. The SEC, like the FDA in *Barr*, "is in a unique – and authoritative – position to view its projects as a whole, estimate the prospects for each, and allocate its resources in the optimal way. Such budget flexibility as Congress has allowed the agency is not for [the Court] to hijack." 930 F.2d at 76 (finding that the court had "no basis for reordering agency priorities"). As this Court explained in *Barr*, "one of the exceptionally rare cases where this court has actually issued an order compelling an agency to press forward with a specific project," the Court was persuaded "largely by agency concessions, that the project backed by plaintiff was plainly more 'urgent' than any that the project's acceleration might retard." *Id.* (citing *Public Citizen Health Research Group v. Auchter*, 702 F.2d 1150 (D.C. Cir. 1983)). No such record has been established here.

Doe argues that, because OWB is its own office, "whistleblower claims do not impede, or compete for resources with, the SEC's other enforcement priorities." Pet. at 4. Not true. OWB is part of Enforcement. Allocating more

personnel to OWB would necessarily come at the expense of Enforcement, or any other division from which such personnel were drawn. Having a separate office handle whistleblower matters does not negate the need to allocate resources across competing priorities – within OWB, Enforcement, and the agency more broadly – to accomplish the agency's overall mission.[18]

5. *Doe is not prejudiced by any delay.*

The fifth *TRAC* factor weighs against issuing a writ because Doe has not demonstrated that he is being prejudiced by any delay in ruling on his award claim. Doe does not contend that he is either incurring any costs as a result of any delay or suffering any legally-cognizable hardships. *See Mexichem*, 787 F.3d at 306 ("Petitioners have failed to show any specific, identifiable cost they will incur" from the EPA's failure to rule promptly on their reconsideration petition).

Doe attempts to show prejudice by arguing delayed whistleblower awards will lead to evidence being lost and will undermine the incentive for whistleblowers to come forward. Pet. at 33. Doe's concerns are misplaced.

First, OWB has procedures in place to obtain declarations and other needed information from investigative staff in the unlikely event that an entire

[18] While Congress created an office within the SEC to handle whistleblower matters, it did not establish a specific budget for that office. *See* https://www.whitehouse.gov/wp-content/uploads/2019/03/oia-fy2020.pdf, *at* p. 1243-46. Thus, increasing funds available to OWB would come at the expense of Enforcement or other divisions or offices.

investigative team is leaving the Commission before an award is issued. And under Commission record retention rules, case files are not slated for destruction until at least 10-years after a case is administratively closed. *See* https://www.archives.gov/files/records-mgmt/rcs/schedules/independent-agencies/rg-0266/n1-266-09-004_sf115.pdf. Administrative closure often happens well after the main investigation concludes.

Second, notwithstanding the time that it takes the Commission to process whistleblower claims, whistleblowers remain incentivized to report wrongdoing. Claimants under NoCA 2016-159 could, collectively, recover $6 million dollars. Many other cases present the possibility of eight-figure awards and most awards have been in the millions. While Doe and others would understandably prefer to receive awards sooner, longer processing times are not likely to dissuade individuals from coming forward given the size of potential awards, and whistleblower tips have increased by more than 76% since FY 2012. *See* https://www.sec.gov/files/sec-2018-annual-report-whistleblower-program.pdf at 20.[19]

The Commission must balance the desire to reward whistleblowers as quickly as practicable with the need to undertake take thorough, consistent and

[19] Whistleblowers who suffer adverse employment actions may also bring civil claims. 15 U.S.C. § 78u-6(h)(1)(B)(i).

accurate application reviews. Doing so is consistent with, and does not frustrate, the statutory goals of Dodd-Frank.[20]

6. *The Commission Has Acted in Good Faith.*

Although a finding that an agency has acted in bad faith is not required to issue a writ, the "absence of bad faith . . . is relevant to the appropriateness of mandamus." *Barr*, 930 F.2d at 76. Doe does not even allege that the SEC has acted in bad faith; rather, he simply says he does not know why an award decision has not been issued. Pet. at 34.

However, Doe grossly underestimates the work involved in reviewing claims (generally and for his particular case) and ignores the number of claims that the Commission has received. As explained above, review of these applications is far more complex and time-consuming than Doe believes. And the NoCA under which Doe's claim has been filed presents greater challenges than many others

[20] The cases Doe cites for the proposition that Commission is frustrating Congressional intent are inapposite. *See* Pet. at 32. *Cutler v. Hayes*, 818 F.2d 879, 898 (D.C. Cir. 1987), concerned the FDA's failure to complete an over-the-counter drug efficacy review 10 years after it started and 20 years after Congress added the efficacy requirement. This inaction threatened the statutory requirement that the FDA withdraw approval for drugs that failed to meet efficacy requirements. This case would support Doe only if the SEC took decades to implement whistleblower regulations and therefore failed to issue awards in that time. *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 269 F. Supp. 540 (E.D. Pa. 1967), concerns a stay pending termination of a related criminal case and *York v. Secretary of Health & Human Servs.*, 582 F. Supp. 768 (W.D. Mo. 1984), concerns calculation of past-due benefits to a social security claimant already deemed entitled to benefits. Neither is comparable to the present case.

because it involves ten claimants who contend that they provided testimony and documents that were critical to the SEC's investigation of Glaxo. The SEC has adopted a multi-layer review process to ensure that award decisions – which can adjudicate claims worth tens or hundreds of millions of dollars – are handled as consistently and accurately as possible, and supported by the administrative record.

The SEC is working diligently and in good faith to process claims within a reasonable period. The agency detailed additional Enforcement and other staff into OWB to provide additional manpower. The Commission has proposed amended rules that should enable it to process award claims more quickly. The agency continues to process applications and issue substantial awards, including almost $60 million to date in 2019. The agency shares Doe's desire that award applications be adjudicated as soon as practicable, but it must also ensure the soundness of its review process.

CONCLUSION

For the foregoing reasons, the Court should deny Doe's mandamus petition.

Dated: July 11, 2019

Respectfully submitted,

/s/ Thomas J. Karr

THOMAS J. KARR
ERIC A. REICHER

Office of the General Counsel
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-9612
202-551-5163
karrt@sec.gov

Counsel for Respondent United States Securities and Exchange Commission

CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 21(d)(1) because it contains 7,657 words, excluding the parts of the motion exempted by Federal Rule of Appellate Procedure 32(f).

I also certify that this motion complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it uses a proportionally spaced, 14-point New Times Roman typeface.

/s/ Eric A. Reicher

CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2019, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to parties and counsel of record registered to receive notice of electronic filings, and that I emailed a courtesy copy to Doe's counsel.

/s/ Eric A. Reicher

Verification

My name is Jane Norberg. I am the Chief of the Commission's Office of the Whistleblower.

I have read the foregoing SEC's Opposition to John Doe's Mandamus Petition. To the extent that this Opposition contains statements of fact relevant to the Office of the Whistleblower, under penalties of perjury as set out in 28 U.S.C. Section 1746, I affirm that these statements are true and accurate to the best of my knowledge.

Dated:
July 11, 2019

Jane Norberg

Washington, DC